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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-617

No. 169

RICHARD W. LECHE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petitioner, Richard W. Leche, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered March 13, 1941, (R. 1101) affirming a judgment of conviction for using the mails in furtherance of a scheme to defraud.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 1099-1101) is reported in 118 F. (2d) 246. The opinion of the

District Court overruling demurrer (R. 34-50) is reported in 34 Fed. Supp. 982.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 13, 1941 (R. 1101) and petition for a rehearing (R. 1105-1144) was denied March 9, 1941 (R. 1145). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925. See also Rule 11 of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented.

1. As to the scheme to defraud:

(a) Whether failure "to exercise business prudence" or "discretion" constitutes a scheme to defraud within the purview of the Mail Fraud Statute (Sec. 215, Criminal Code, 18 U. S. C. A. 338).

(b) Whether the trial court may, after an indictment has been tried upon the scheme to defraud therein charged and by the means therein alleged, instruct the jury to disregard as surplusage the sole averment of fraud and the two and only two false representations therein set forth and submit the case to the jury upon a charge, not alleged in the indictment, without destroying the indictment, ousting the jurisdiction of the court and depriving the petitioner of due process of law.

2. As to the use of the mails:

(a) Whether the forwarding of a draft by a bank, which cashed it for one of the defendants, in a cash letter containing other checks and drafts to its correspondent bank in an-

other city, which, thereafter, forwarded it in a cash letter with other checks and drafts to its correspondent bank in a third city, a bank other than the one on which the draft was drawn, may be the basis of a charge that the defendants knowingly caused the draft to be delivered by mail "according to the direction thereon".

(b) Whether delivery of a letter which shows on its face that it was in reference to a particular transaction outside of and not a part of the fraudulent scheme could be for the purpose of executing such scheme or attempting so to do.

(c) Whether use of the mail, after the scheme was executed, could be for the purpose of executing such scheme or attempting so to do.

(d) Whether the jury may, from the fact that "it had been established beyond a reasonable doubt that the drafts were in Shreveport at one time and that they turned up in Alexandria" infer that they had been delivered by mail and, from that inference, further infer that the defendants knowingly caused them to be delivered by mail "according to the direction thereon".

3. Whether an indictment, which in one count alleges that the defendants on two separate and distinct occasions entered into an agreement to sell to and purchase for the Louisiana Highway Commission, without complying with the State statute requiring competitive bids and contracts, two separate and distinct quantities of trucks, each agreement contemplating but a single purchase, alleges two separate and distinct schemes and is duplicitous.

4. Whether petitioner received a fair and impartial trial as guaranteed to him by the Constitution of the United States.

Statute Involved.

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * *, or shall knowingly cause to be delivered by mail according to the direction thereon * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Statement.

An indictment in three counts was returned against petitioner, one L. P. Abernathy and one George B. Younger in the District Court for the Western District of Louisiana, charging violations of the Mail Fraud Statute (R. 1-16). Abernathy and Younger at the opening of the trial withdrew their pleas of not guilty and pleaded guilty (R. 56), and after the trial and sentence of the petitioner were sentenced to pay fines of $1000 and $3000 respectively (R. 68).

Petitioner, proceeding to trial alone, was convicted upon three counts of the indictment (R. 74) and sentenced to imprisonment for ten years, five years on the first count and five years on the second count, the sentence on the second count to run consecutively with the sentence on the first count. Imposition of sentence on the third count was suspended and the petitioner ordered placed on non-active probation (R. 75).

The indictment charges [1] that the defendants, Leche, then governor of the State of Louisiana, Abernathy, then chairman of the Louisiana Highway Commission, and Younger, of the Younger Motor Truck Company, devised "a scheme or artifice to defraud, and for obtaining money and funds by means of false and fraudulent pretenses, representations and promises" in the sum of $111,370.56 from the Louisiana Highway Commission. The indictment in general terms charges that the defendants sold to and purchased through the Younger Motor Truck Company, for the Louisiana Highway Commission, International trucks, and thus caused the Louisiana Highway Commission to pay to the Younger Motor Truck Company in October, 1937 and September, 1938 for two purchases of a total of 233 trucks, $397,332.05, of which $268,069.59 represented the cost of the trucks, $17,891.90 the freight and taxes, and $111,370.56 profit distributed by the Younger Motor Truck Company, George Younger and one James Thomas.

The indictment then proceeds to more particularly describe the scheme and alleges that the defendants on August 1, 1937, entered into an agreement to sell to and purchase for the Louisiana Highway Commission 138 trucks invoiced under date of October 5, 1937, and paid by checks of the Louisiana Highway Commission issued and caused to be issued by the defendants on October 13, 1937 for $227,173.54, of which sum $157,864.01 represented the cost of the trucks to the defendants, $11,378.47 the freight and taxes, and

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[1] Conclusions of the pleader (*Boykin* v. *United States*, 11 F. (2d) 484; *Middlebrooks* v. *United States*, 23 F. (2d) 244) and allegations by way of recital (*Dalton* v. *United States*, 127 Fed. 544, 547; *Ader* v. *United States*, 284 Fed. 1324; *Harris* v. *United States*, 104 F. (2d) 41, 45) are not averments of fact to be considered in determining the sufficiency of the indictment and, of course, have been excluded and only averments of fact set forth.

$57,931.06 profit distributed through the Younger Motor Truck Company, George Younger and James Thomas.

The indictment further alleges that a year later the defendants on July 25, 1938, entered into an agreement to sell to and purchase for the Louisiana Highway Commission 95 trucks invoiced under date of September 15, 1938, and paid by warrant of the Louisiana Highway Commission issued and caused to be issued by the defendants on September 16, 1938, for $170,158.51, of which $110,205.58 represented the cost of the trucks to the defendants, $6,513.43 the freight and taxes, and $53,439.50 profit distributed through the Younger Motor Truck Company, George Younger and James Thomas.

The indictment further alleges that the defendants failed and refused to comply with the laws of the State of Louisiana, requiring all political subdivisions of the State, before the purchase of materials or supplies in excess of $500, to advertise for bids, because the defendants knew that bids would be submitted for the sale of the trucks by other truck manufacturers at prices as low as the defendants could obtain from such manufacturers and the defendants would thus be prevented from collecting from the Louisiana Highway Commission a profit of approximately $111,370.56 on the sales and purchases of trucks invoiced to the Louisiana Highway Commission under dates of October 5, 1937 and September 15, 1938, of which sum $56,953.44 was distributed to the Younger Motor Truck Company and George Younger, $54,417.12 to James Thomas, who subsequently distributed $31,000 of this amount to Richard W. Leche.

The indictment then sets forth two and only two false representations:

(1) On October 5, 1937, that the Louisiana Highway Commission was indebted to the Younger Motor Truck Company

in the sum of $227,173.54 for 138 trucks delivered by the defendants through the Younger Motor Truck Company, whereas in truth and in fact, as the defendants knew, the trucks were purchased by the defendants at a cost of $169,-242.48, including freight and taxes, which sum was all that was due by the Louisiana Highway Commission "because it was approximately the amount that the manufacturers of the said trucks and equipment would have, without the interference of the said defendants, sold the motor trucks and equipment to the Louisiana Highway Commission under legal and competitive bids and contracts."

(2) On September 15, 1938, that the Louisiana Highway Commission was indebted to the Younger Motor Truck Company in the sum of $170,158.51 for 95 trucks delivered by the defendants through the Younger Motor Truck Company, whereas, in truth and in fact, as the defendants knew, the trucks were purchased by the defendants at a cost of $116,719.01, including freight and taxes, which sum was all that was due by the Louisiana Highway Commission "because it was approximately the amount the manufacturers of the said trucks and equipment would have, without the interference of the said defendants, sold the motor trucks and equipment to the Louisiana Highway Commission under legal and competitive bids and contracts."

Briefly summarized, the indictment alleges that the defendants devised a scheme to defraud the Louisiana Highway Commission by purchasing trucks for the Commission from the Younger Motor Truck Company without advertising for bids as required by law.

The indictment was tried from the time of its filing to the charge of the court upon the theory that the State statute required the defendants to advertise for bids before purchasing the trucks and that the defendant's failure and

refusal to comply with this statute constituted the basis of the scheme to defraud therein charged.[2]

The district court, however, in its charge instructed the jury:

> "This particular statute that was referred to, and apparently relied upon, is very questionable, that is, in its application to a transaction of this sort in the use of the words 'materials and supplies'. It may be seriously doubted as to whether that includes capital investments or equipment such as trucks and so forth which may be the loophole through which those matters were carried on as these were. But in any event you may put that statute aside. You are not to consider it here. Regardless of that, there still remains the duty upon every one connected with the matter to exercise discretion" (R. 767).

and later at the request of the prosecutor added:

> "Yes, gentlemen, in view of the ruling which I have made with respect to the State statute on the question of requiring bids, as I said a while ago, that statute says that every contract for more than five hundred dollars for the purchase of material and supplies, that bids and advertisement should be made. Well, now, supplies do not necessarily mean equipment or capital investment like the purchase of trucks. Materials do not necessarily include that and for that reason I have withdrawn that statute entirely although there is mention of it in the indictment. You should disregard that as surplusage."

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[2] See opinion overruling demurrer (R. 48); statement of the court as to its understanding of the contention of the government as made in the indictment and in its opening statement (R. 172); statement of the prosecutor (R. 173); motion for directed verdict by defendant on ground that statute requiring bids did not apply (R. 695); statements of government counsel in summation, commenting on defendants' failure to do their public duty and advertise for bids (R. 700-702-703); charge of the court at time of withdrawing statute that it was "apparently relied upon" (R. 767).

Upon review, the Circuit Court of Appeals found:

> "The district court instructed the jury that it was doubtful whether the state law required the defendants to advertise for bids, and to disregard that question, since, without the statute, there still remained the duty to exercise business prudence. We think the court committed no error in this respect, because the averment as to the requirement under the state law was wholly immaterial and unnecessary."

The use of the mails made the basis of the first count of the indictment, was that the defendants, on October 14, 1937, caused to be delivered by mail, to the Guaranty Bank and Trust Company, Alexandria, Louisiana, a certain letter under registry number 34135 and voucher checks, the letter and checks being set forth in full in the indictment (R. 8-12). The use of the mails made the basis of the second count, was that on September 20th, 1938, defendants caused to be delivered by mail to the Rapides Bank and Trust Company in Alexandria, Alexandria, Louisiana a certain sight draft drawn on the Guaranty Bank and Trust Company by the Younger Motor Truck Company, by George Younger, on September 17th, 1938, for the sum of $22,000.00 payable to James Thomas, the sight draft being set forth in full (R. 13-14). The use of the mails made the basis of the third count, was that the defendants caused to be forwarded by mail, a certain sight draft drawn by the Rapides Bank and Trust Company, dated September 21st, 1938, payable to the Commercial National Bank, Shreveport, Louisiana, for the amount of $35,026.23, in which amount was included the $22,000.00 collected by the Rapides Bank and Trust Company from the Guaranty Bank and Trust Company, on the sight draft drawn by the Younger Motor Truck Company to James Thomas (R. 14-16).

Petitioner, demurred to the indictment which was overruled (R. 35). The Government was ordered to furnish, and did furnish, a bill of particulars as to the mailings made the basis of the second and third counts of the indictment (R. 50). Motions for a new trial and in arrest of judgment were denied (R. 66).

As the sufficiency of the evidence must, of course, be judged with respect to the offense actually alleged in the indictment, *Walker* v. *United States,* 104 F. (2d) 465, 469, the district court's action in striking out the scheme to defraud actually alleged and in submitting the case to the jury on a charge not alleged in the indictment, renders not only unnecessary but impossible any orderly or proper discussion of facts. Suffice it to say the record is barren of any substantial evidence establishing petitioner's participation in any scheme to defraud.

Reasons Relied Upon for Granting Writ.

1. In holding that failure "to exercise business prudence" constituted a scheme or artifice to defraud within the purview of the Mail Fraud Statute, the Circuit Court of Appeals has decided an important and novel question of Federal law, which has not been, but should be, settled by this Court, and has decided that question in a way probably in conflict with decisions of this Court, other Circuit Courts of Appeals and of decisions of the same Circuit. The ruling of the Circuit Court eliminating fraud from a scheme to defraud is such an expansion of the statute by judicial construction and such a revolutionary rewriting of the Act as to require the exercise of this Court's supervisory jurisdiction. The district court's action, affirmed by the Circuit Court, in striking out a material part of the indictment and submitting the case to the jury on a charge other than that actually charged and tried was "a sheer denial of due process" and violated petitioner's rights guaran-

teed to him by the Fifth Amendment to the Constitution of the United States.

2. The decision of the Circuit Court of Appeals affirming the judgment of conviction as to the use of the mails made the basis of the three counts of the indictment is in clear conflict with the decisions of other Circuit Courts of Appeals in the cases of *Mitchell* v. *United States,* 118 F. (2d) 653; *Dyhre* v. *Hudspeth,* 106 F. (2d) 286; *Whealton* v. *United States,* 113 F. (2d) 710; *United States* v. *Baker,* 50 F. (2d) 122; *Mackett* v. *United States,* 90 F. (2d) 462.

3. The ruling of the Circuit Court of Appeals that the indictment is not duplicitous is in clear conflict with the decision of the Circuit Court of Appeals in *United States* v. *Siebricht,* 59 F. (2d) 976.

4. In overruling the claim that petitioner was denied a fair trial, the Circuit Court of Appeals so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction, and it, likewise, decided Federal questions in a way probably in conflict with applicable decisions of this Court and the decisions of other Circuit Courts of Appeals.

ARGUMENT.

I.

Although the indictment charged that a penal statute of the State of Louisiana (Act 20 of 1935, Dart's Gen. Stat. Sec. 6730, *et seq.*) required the defendants to advertise for bids before purchasing the trucks (R. 6), and was tried by the court, government and petitioner upon the theory that the defendants' failure and refusal to comply with this statute constituted the basis of the scheme to defraud

therein charged,[3] the district court instructed the jury that it was doubtful whether the State statute required the defendants to advertise for bids and to disregard that question, since, without the statute, there still remained "the duty upon every one connected with the matter to exercise discretion" (R. 767), and later, at the request of the prosecutor (R. 779), withdrew "that statute entirely" and instructed the jury to disregard "mention of it in the indictment" as surplusage (R. 779-800).

Upon review, the Circuit Court of Appeals found that the district court "committed no error in this respect, because the averment as to the requirement under the State law was wholly immaterial and unnecessary," and that "without the statute, there still remained the duty to exercise business prudence." It is clear that petitioner, indicted for using the mails to defraud, was convicted of failing "to exercise discretion", and that the Circuit Court of Appeals, to affirm the judgment of conviction herein, was forced to hold that failure to exercise "business prudence"—"discretion" re-edited—constituted a scheme to defraud within the meaning of the Mail Fraud Statute.

If failure "to exercise business prudence" becomes a Federal offense upon the mailing of a letter, Sec. 215 of the Criminal Code becomes by judicial construction not a "mail fraud", but a "business prudence" statute, lacking every essential element of a scheme to defraud as that term has been traditionally understood.

The crime denounced by Sec. 215 is a "scheme or artifice to defraud or for obtaining money or property by means of

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[3] See opinion overruling demurrer (R. 48); statement of the court as to its understanding of the contention of the government as made in the indictment and in its opening statement (R. 172); statement of the prosecutor (R. 173); motion for directed verdict by defendant on ground that statute requiring bids did not apply (R. 695); statements of government counsel in summation, commenting on defendants' failure to do their public duty and advertise for bids (R. 700, 702, 703); charge of the court at time of withdrawing statute that it was "apparently relied upon" (R. 767).

false or fraudulent pretenses or representations or promises." The statute does not even embrace all dishonest methods of deprivation, but only those "in the nature of deceit or fraud as known to the law or as generally understood." *Fasulo* v. *United States,* 272 U. S. 620, 629. "Without deceit there can be no fraud in the legal sense of the word. No fraud can be committed but by deceitful practices; practices calculated to deceive." *United States* v. *Watkins,* 29 Fed. Cas. 418, 437. "These quoted words (scheme or artifice to defraud) show unmistakably that the victim's money must be taken from him by deceit." *Naponiello* v. *United States,* 291 Fed. 1008.

Deceit, therefore, is a basic element and an essential ingredient of a scheme to defraud. "Prudence", on the other hand, as defined in the New Century Dictionary, is "the quality or fact of being prudent; cautious; practical wisdom; good judgment; discretion; regard for one's own interest; provident care in management; economy or frugality."

Failure "to exercise business prudence" and fraud, both in their nature and effect, are as far apart as the two poles. Failure to "exercise business prudence" is simply the failure to exercise the virtue of prudence in business and in no way partakes of deceit, while fraud is deceit or trickery deliberately practiced.

The words of the act suggest no intention to include failure to exercise "business prudence". It was not permissible for the court to search for and read into the statute an intention that the words themselves do not suggest. "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo* v. *United States,* 272 U. S. 620, 629.

The ruling of the circuit court takes the fraud out of a scheme to defraud, hurls Section 215 into the field of civil

nal. Expanding the statute by construction to include faillaw and renders acts, never before regarded as such, crimiure "to exercise business prudence" was an unconstitutional assumption of the legislative powers of Congress and a revolutionary rewriting of the Mail Fraud Statute.

But even if we indulge in the illogical and untenable assumption that a scheme to defraud embraces failure "to exercise business prudence", an examination of that part of the indictment setting forth the scheme to defraud (R. 1-8) makes it evident that neither failure "to exercise discretion" or "business prudence" is therein charged.

There is no fact therein averred charging the defendants with "the duty to exercise business prudence" or "discretion". There is no language therein used, which by the wildest stretch of the imagination, could be construed as setting forth any such charge. Particulars of failure "to exercise business prudence" or "discretion" are nowhere alleged.

Charging the defendants with having devised a scheme to defraud alone is not sufficient. *United States* v. *Hess,* 124 U. S. 486. "The scheme to defraud, while not the gist of the offense, should, of course, be set out with sufficient particularity and definiteness to advise the defendant as to the particulars thereof." *Boatwright* v. *United States,* 105 F. (2d) 737, 738. Particulars of the scheme are matters of substance and their omission cannot be supplied by intendment or implication. *United States* v. *Hess,* 124 U. S. 486; *Harris* v. *United States,* 104 F. (2d) 41, 45; *Brooks* v. *United States,* 146 Fed. 223, 231. "An allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud." *Evans* v. *United States,* 153 U. S. 584, 594; *Bannon* v. *United States,* 156 U. S. 469.

The conviction of the petitioner upon a charge of failure to exercise "discretion" or "business prudence" was a conviction upon a charge not alleged in the indictment. As

said by this Court in *Thornhill* v. *Alabama*, 310 U. S. 87, 96: "Conviction upon a charge not made would be a sheer denial of due process."

Moreover, an examination of the indictment and the authorities applicable thereto makes it clear that "the averment as to the requirement under the State law", branded by the district court as "surplusage" and by the Circuit Court of Appeals as "wholly immaterial and unnecessary", is an essential element of the scheme to defraud charged and a material part of the indictment.

A scheme to defraud consists of two elements: (1) the scheme to defraud, and (2) the means by which it is to be carried out. *Sunderland* v. *United States*, 19 F. (2d) 202, 207; *Silkworth* v. *United States*, 10 F. (2d) 711, 714; *Gourdain* v. *United States*, 154 Fed. 453, 457. In considering the sufficiency of an indictment, the scheme to defraud and the means by which it is to be carried out must be distinguished. *Muench* v. *United States*, 96 F. (2d) 332, 335.

"It has been settled by repeated decisions that a good indictment under this statute must allege not only that the defendant had devised a scheme or artifice to defraud, but it must also set out clearly what the artifice was wherein the fraud consisted, and how it was to be accomplished, and that charging the offense in the words of the statute alone is not sufficient. *United States* v. *Hess*, 124 U. S. 486; *Stokes* v. *United States*, 157 U. S. 187." *Etheredge* v. *United States*, 186 Fed. 436.

The indictment as found by the grand jury, irrespective of the question of duplicity, sufficiently charged a scheme to defraud within the Mail Fraud Statute. It alleged not only that the defendants had devised "a scheme and artifice to defraud and for obtaining money and funds by means of false and fraudulent pretenses, representations and promises," but it "also set out clearly what the artifice

was wherein the fraud consisted," namely, that the defendants failed and refused to comply with the State statute requiring advertisement for bids, and "how it was to be accomplished," namely, by means of the two, and only two, false representations and pretenses therein set forth.

However, upon eliminating the averment as to the requirement under the state law, there is no fact averred charging the defendants or any of them with any duty or with the violation of any duty in relation to the purchase of the trucks. There is no fact averred showing that the defendants were in a position to commit fraud in the purchase of the trucks or that they violated any trust in so doing.

While the indictment charges that the petitioner was Governor of the State of Louisiana and Abernathy, Chairman of the Louisiana Highway Commission, it nowhere discloses the duties of the Governor or the duties of the Chairman of the Highway Commission, or the duties, if any, that petitioner, as Governor, or Abernathy, as Chairman, owed to the Highway Commission, in relation to the purchase of the trucks, other than the duty to advertise for bids.

An indictment charging a conspiracy or scheme to defraud the State, whereby an official was to secretly receive a portion of what was paid for supplies furnished on his requisition, must disclose the duties of such official and the duties that he owed to the State in relation to the purchase of said supplies. *Crawford* v. *United States*, 212 U. S. 183, 191. An indictment charging a public official and others with a scheme to defraud the State must set out an agreement to defraud the State and facts showing that the parties charged were in a position to commit the fraud. *United States* v. *Gouled*, 253 Fed. 239, 242. *Gouled* v. *United States*, 273 Fed. 506. The averment as to the requirement

under the State law is the sole allegation charging the defendants with any duty or obligation in relation to the purchase of the trucks, and the sole allegation charging a violation of any duty or trust. Eliminating the averment as to the requirement under the State statute, the indictment is fatally defective.

Moreover, this averment is the sole averment of fraud set forth in the indictment. The statute requiring advertisement for bids was enacted to prevent fraud in the purchase of materials and supplies, and the charge that the defendants failed and refused to comply with such a statute is a charge of fraud. Eliminating the averment as to the requirement under the State statute, there is no fact averred charging the defendants with "anything in the nature of deceit or fraud as known to the law or as generally understood." There is no fact averred setting forth "what the artifice was wherein the fraud consisted." The averment as to the requirement under the State statute, the sole allegation setting forth "what the artifice was wherein the fraud consisted", is a material part of the indictment.

No stronger proof of its materiality could be furnished than the pleader's own words. The indictment alleges that the defendants failed and refused to comply with the State statute *because* the defendants knew that bids would be submitted by motor truck manufacturers for the sale of said trucks at prices as low as the defendants could obtain from such manufacturers, and the defendants "would thus be prevented from collecting from the Louisiana Highway Commission" a profit on the sales and purchases of trucks invoiced to the Louisiana Highway Commission on October 5, 1937, and September 15, 1938 (R. 6). The indictment thus alleges that it was only because the defendants failed to advertise for bids that they were able to purchase the trucks through the Younger Motor Company for the Louisi-

ana Highway Commission and divide the profits therefrom, that is, without their failure and refusal to comply with the State statute, there would have been no purchase of trucks as therein charged, no profit to be divided, and no scheme to defraud the Louisiana Highway Commission.

The fact that the district court found it necessary, after striking out this averment, to frame and substitute its own charge of failure "to exercise discretion", a charge not alleged in the indictment, and the fact that the Circuit Court found it necessary to re-edit the charge submitted to the jury and to substitute therefor its own charge of failure to exercise "business prudence", would seem to conclusively establish the materiality of the averment in question.

Moreover, the indictment not only alleges that the defendants failed and refused to comply with the State statute requiring competitive bids and contracts, but from its filing to the closing moments of the trial, when the court instructed the jury, was tried upon the theory that defendants' failure and refusal to comply with the statute constituted the basis of the scheme therein charged. It is elementary that a case may not be tried upon one charge and submitted by the court to the jury on an entirely different charge, without depriving the defendant of his day in court.

In addition thereto, when the district court "withdrew that statute entirely" and directed the jury to disregard "mention of it in the indictment" as surplusage, it withdrew not only the averment as to the requirement under the State statute but, in addition thereto, every allegation in the indictment therein affirmatively shown to have been based and founded by the grand jury on the defendants' failure and refusal to comply with that statute.

An examination of that part of the indictment (R. 7-8) which sets forth the two and only two false representa-

tions therein contained, makes it evident that the grand jury based its finding that each of said pretenses was false, and wherein and in what particular it was false, on its specific finding that the law required the defendants to advertise for bids. It therefore follows that when the district court withdrew from the consideration of the jury this specific charge, it withdrew in addition thereto the two and only two false representations set forth in the indictment.

It is elementary that to sustain an indictment charging a scheme to defraud by means of false representations, at least one of the false representations therein alleged must be proved. *Popham* v. *United States*, 11 F. (2d) 966; *Belt* v. *United States*, 73 F. (2d) 888, 889; *Sasser* v. *United States*, 29 F. (2d) 950, 951; 2 Bishop's Criminal Law 418.

As said by this Court, "When the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounced." *United States* v. *New South Farm and Home Company*, 241 U. S. 64-70.

As the two and only two false representations and pretenses set forth in the indictment went out with the withdrawn statute upon which they were based, it is clear that the two essentials of a scheme to defraud were eliminated, to-wit: (1) the artifice wherein the fraud consisted, namely, failure and refusal to comply with the statute requiring bids, and (2) the means of carrying out the fraud, namely, the two and only two false representations and pretenses set forth in the indictment.

It is fundamental that no essential element of an offense can be omitted without destroying the entire pleading. It matters not whether such omission occurs through the fault of the pleader in drawing the indictment, or through the fault of the trial court in striking out a material part thereof as surplusage. An allegation necessary to the validity of the indictment cannot be treated as surplusage.

When the trial court ruled that the State statute requiring competitive bids and contracts did not apply to the purchase of trucks, nothing remained for the court to do but to instruct the jury that the government had failed to prove a material part of the indictment and direct a verdict of not guilty.

Its action in striking out a material part of the indictment destroyed the entire pleading and ousted its jurisdiction. Its continuance of the trial and submission of the case to the jury on its own charge of failure "to exercise discretion", a charge not alleged in the indictment, was in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States, and a "sheer denial of due process." *Ex parte Bain,* 121 U. S. 1; *United States* v. *Norris,* 281 U. S. 619, 622; *Thornhill* v. *Alabama,* 310 U. S. 87, 96.

II.

The use of the mails made the basis of the first count was that the defendants caused to be delivered by mail to the Guaranty Bank and Trust Company, Alexandria, Louisiana, a certain letter under registry No. 34135 and voucher checks. The letter and voucher checks are set forth in full in the indictment (R. 9-12). The letter was written by the auditor of the Louisiana Highway Commission at the request of George Younger, President of the Younger Motor Truck Company and was placed in the mail at Baton Rouge. The voucher checks (R. 10-12) were four in number, three of which were drawn on the American Bank and Trust Company, New Orleans, La., and the fourth on the City National Bank, Baton Rouge, La. The letter states in part:

> "You will note that Mr. Younger receipted these vouchers and endorsed same payable to your order which we understand is in accordance with his agreement with your bank."

The letter shows on its face that the voucher checks were not forwarded to the Guaranty Bank and Trust Company to be paid, as said checks were drawn on banks in New Orleans, Louisiana, and Baton Rouge, Louisiana, but were forwarded to the bank in accordance with an agreement between Younger and the bank, outside of and not a part of the fraudulent scheme. It also shows that Younger receipted the vouchers and endorsed the checks payable to his bank, before the mailing.

It is settled law that the mailing of a letter in the execution or the attempted execution of a fraudulent scheme is the gist of the offense denounced by the statute. It is that act and it alone which confers jurisdiction upon the courts of the United States to punish devisers of fraudulent schemes. *Whealton* v. *United States,* 113 F. (2d) 710. *Busch* v. *United States,* 52 F. (2d) 79-81. *Spillers* v. *United States,* 47 F. (2d) 893. It is evident that a mailing for the purpose of carrying out a contract, as in the instant case, outside and not a part of the fraudulent scheme, cannot be for the purpose of executing the scheme or attempting so to do. *McLendon* v. *United States,* 2 F. (2d) 660. *United States* v. *Quinby,* 51 F. (2d) 167.

The use of the mails made the basis of the second count was that on September 20, 1938, defendants caused to be delivered by mail to the Rapides Bank & Trust Company in Alexandria, Alexandria, Louisiana, a certain draft drawn on the Guaranty Bank and Trust Company of Alexandria by the Younger Motor Truck Company by George Younger on September 17, 1938, for the sum of $22,000, payable to James Thomas, bearing the notation "commission on trucks". This draft represented payment to Thomas of a commission by Younger on the 1938 sale of 95 trucks. Thomas endorsed and deposited this draft in the City National Bank of Baton Rouge on September 17, 1938 (G-44, R. 972), and on the same date the City National Bank

credited Thomas' account with $22,000 (G-45, R. 973). The City National Bank of Baton Rouge thereupon forwarded the draft and other checks in a cash letter totalling $26,576.28 to the Commercial National Bank in Shreveport (R. 272-273, G-66, R. 1005). The Commercial Bank in turn forwarded the draft and other checks in a cash letter totalling $22,073.82 to the Rapides Bank & Trust Company in Alexandria (R. 327-329, 335-336, 341). The Rapides Bank & Trust Company sent it by special messenger to the Guaranty Bank & Trust Company and it was cleared (R. 336). The delivery of this draft to the Rapides Bank & Trust Company is the basis of the charge in the second count that the defendants knowingly caused the draft to be delivered by mail according to the direction thereon. The Government was ordered to and did file a bill of particulars as to the mailing in this count (R. 50-52). The bill of particulars alleged (R. 51) that this sight draft "was part of the illegal profit obtained under the scheme and artifice to defraud and was that portion of said profits which was collected from the said Louisiana Highway Commission by the said defendant, George Younger, on the sale of trucks made by the said defendant, George Younger, under said scheme and artifice to defraud in September, 1938, and which was rebated to James Thomas for the account of the said defendant Richard W. Leche."

The indictment charged a specific scheme for the purpose of defrauding the Louisiana Highway Commission out of a definite sum of money. The bill of particulars, as hereinbefore set forth, alleges that this $22,000 draft was a part of the monies collected from the Louisiana Highway Commission by Younger "under the scheme". It is evident that the mailing of the draft could not be for the purpose "of executing" a scheme to defraud, which the bill of particulars alleges had already "been executed." The bill of particulars alleges that this draft "was part of the illegal

profit obtained under the scheme and artifice to defraud and was collected from the Louisiana Highway Commission." A profit already obtained "under the scheme" cannot possibly be for the purpose of executing the scheme. The scheme was consummated and completed when Younger received his money from the Louisiana Highway Commission. The use of the mails after the scheme has been executed cannot be for the purpose of executing the schemes within the intent and meaning of Section 215. *Mitchell* v. *United States,* 118 F. (2d) 653; *McNear* v. *United States,* 65 F. (2d) 861; *Dyhre* v. *Hudspeth,* 106 F. (2d) 286; *Armstrong* v. *United States,* 65 F. (2d) 853; *Little* v. *United States,* 73 F. (2d) 861; *Stewart* v. *United States,* 119 Fed. 89; *Merrill* v. *United States,* 95 F. (2d) 669.

Further than this, the ledger sheet of the City National Bank of Baton Rouge under date of September 17, 1938, shows the credit to Thomas' account of this $22,000 draft and an immediate charge against the account of checks for $10,020.03 and $2,410.36 (R. 973). The ledger sheet further shows that these checks could not have been paid without the bank crediting the $22,000 draft to Thomas' account, as the account before the deposit was insufficient. The law is settled that the legal effect of the bank crediting the check to Thomas' account was the ordinary case of the transfer or sale of the check by Thomas, and the purchase of it by the bank, and upon its delivery to the bank the title to the check passed to the bank and it became the owner thereof. *Burton* v. *United States,* 196 U. S. 283; *City of Douglas* v. *Federal Reserve Bank,* 271 U. S. 489; *Daykin* v. *Bayly,* 290 U. S. 143. In *Daykin* v. *Bayly* this Court states: "In the ordinary case unrestricted endorsement and deposit of checks * * * would create the relation of debtor and creditor. The bank would collect the item not as agent for the depositor, but as owner."

The $22,000 draft was sent forward by the City National Bank of Baton Rouge to the Rapides Bank at Alexandria for the purpose of having that bank collect it from the Guaranty Bank & Trust Company, that is, the draft was sent forward to be paid, and the City National Bank was its owner when sent, and collected the draft as owner and not as the agent of Thomas. The action of the City National Bank in taking steps to obtain payment for itself of the draft of which it was the owner, can in no sense be said to be an action for the purpose of executing the scheme to defraud or attempting so to do, but the act of an owner in regard to its own property. *Burton* v. *United States,* 196 U. S. 283, 301.

The draft's connection with the scheme to defraud ended when Thomas sold the check to the bank. There was no use of the mails by the defendants or for the defendants. The use of the mails was the independent act of the Whitney Bank, independent of the defendants and independent of the scheme charged to have been devised by the defendants. The act of the City National Bank in causing the draft to be placed in the mails, if it was so placed, to be sent to the Rapides Bank & Trust Company of Alexandria, was the independent act of the bank, not in furtherance of the scheme charged and not caused by the defendants.

Moreover, the delivery of the draft in a cash letter to the Rapides Bank and Trust Company, a bank other than the one on which it was drawn, could not have been foreseen by Thomas at the time he deposited the draft in the bank at Baton Rouge so as to charge him with "knowingly causing the draft to be delivered according to its direction thereon." While "knowingly" does not require absolute knowledge or intent, the use of the mails must be such as

may fairly be foreseen by the defendant as a step in the execution of the scheme.

Moreover, the draft was not delivered by mail according to the direction thereon. The draft was drawn upon the Guaranty Bank and Trust Company and was delivered to that bank by special messenger. Delivery to the Rapides Bank and Trust Company was not a delivery of the draft "according to the direction thereon" nor could the delivery of the cash letter be a delivery according to the direction thereon. A cash letter could contain any number of checks and thus delivery of the one cash letter could be the basis of any number of different charges against any number of different persons for any number of different schemes to defraud. It would seem as though the Government has gone a long way to seize upon the mailing made the basis of the second count.

Further than this, there is no proof of the mailing on the second count. The trial court said (R. 768, 769), "It has been established beyond a reasonable doubt that the drafts were in Shreveport at one time and that they turned up in Alexandria. Now the issue of fact there is how did they get here?" There was no proof of mailing to sustain counts two and three. *United States* v. *Baker,* 50 F. (2d) 122; *Whealton* v. *United States,* 113 F. (2d) 710; *Mackett* v. *United States,* 90 F. (2d) 462; *Freeman* v. *United States,* 20 F. (2d) 748.

The use of the mails made the basis of the third count was a draft drawn on the Whitney National Bank of New Orleans by the Rapides Bank & Trust Company, payable to the Commercial National Bank of Shreveport, in the sum of $35,026.23, covering the collection of the $22,000 draft and other items. It is evident that the mailing made the basis of the third count falls with the mailing made the basis of the second count.

III.

The petitioner demurred to the indictment on the ground, among others, that it was bad for duplicity (R. 17-19). The court overruled the demurrer in an opinion (R. 35-49).

A scheme to defraud, when shared among several, becomes a conspiracy. *United States* v. *Herzog*, 25 F. (2d) 487; *Van Riper* v. *United States*, 13 F. (2d) 961. It is elementary that the gist of a conspiracy is an agreement between two or more persons (*Cooper* v. *O'Connor*, 99 F. (2d) 135; *Tinsley* v. *United States*, 48 F. (2d) 890), and that a conspiracy is complete on the forming of the agreement. *Wilder* v. *United States*, 100 F. (2d) 177.

The indictment in one count alleges:

> (1) "That the said defendants would and did on or about August 1, 1937, enter into an agreement to sell to and purchase for the Louisiana Highway Commission * * * 138 motor trucks * * * invoiced to the Louisiana Highway Commission under date of October 5, 1937 * * * for a total sum of $227,-173.54", etc. (R. 4).
>
> (2) "That the defendants would and did on or about July 25, 1938, enter into an agreement to sell to and purchase for the Louisiana Highway Commission * * * 95 motor trucks * * * invoiced to the Louisiana Highway Commission under date of September 15, 1938 * * * for $170,158.51", etc. (R. 5).

The indictment further alleges (R. 6) that the said defendants did fail and refuse to comply with the laws of Louisiana requiring competitive bids and contracts prior to the purchase of said trucks invoiced to the Louisiana Highway Commission under date of October 5, 1937, and September 15, 1938. The indictment then sets forth (R. 7-8) two false and fraudulent pretenses, representations and promises, one made on October 5, 1937, in reference to the sale of 138 trucks, and the other made on September

15, 1938, in reference to the sale of 95 trucks. The indictment thus alleges all the essential particulars of two separate and distinct schemes.

It is evident that the indictment alleges two agreements, that is, two schemes, one devised on August 1, 1937, in reference to the purchase of 150 trucks, and the other devised on July 25, 1938, in reference to the purchase of 95 trucks. While the indictment alleges that each of said schemes was a further part of a general scheme devised by the defendants in reference to the sale and purchase of 233 trucks, it is clear that the facts alleged and not the conclusion of the pleader must govern in determining the question.

Moreover, the evidence produced at the trial by the Government establishes two separate and distinct schemes. Both Thomas (R. 398, 399) and Abernathy (R. 672, 673), witnesses called by the Government, testified that the only thing discussed at the meeting when the first agreement was made, was the purchase of 150 trucks and equipment therefor (R. 685). There is not the slightest evidence that, at this time, a second purchase was contemplated. Thomas (R. 412, 413), the only witness who testified to a second meeting, a year later, on July 25, 1938, when the second agreement was entered into, testified as follows:

> Q. "That was a separate new transaction?"
> A. "Yes."
> Q. "And had no connection with the previous transaction of 138 trucks, did it?"
> A. "No."
> Q. "It was separate and distinct?"
> A. "That's right."

As said by the court in *United States* v. *Siebricht*, 59 F. (2d) 976, "It is nothing but guesswork to say that the second purchase was contemplated when the first was undertaken or that the two transactions were part of a general plan."

The use of the mails (R. 8-12) made the basis of the first count of the indictment related solely to the first scheme and had nothing to do with the second scheme. The use of the mails made the basis of the second count (R. 13) of the indictment related solely to the second scheme and had no relation or connection with the first scheme.

As petitioner was sentenced to imprisonment for five years on the first count and to imprisonment for five years on the second count, said sentences to run consecutively, it is evident that his substantial rights have been greatly prejudiced by the joinder of the two separate and distinct offenses in one count of the indictment. Section 1024 of the Revised Statutes (18 U. S. C. A. 557) permits the joinder of two separate offenses in one bill or indictment under certain circumstances, but directs that each offense shall be charged in a separate count. If the two schemes to defraud had been charged in separate counts, separate verdicts would have been required. Petitioner, before being sentenced to five years on each count, was entitled to a separate judgment on each of the two schemes.

The indictment in one count charges and the evidence establishes beyond any doubt two separate and distinct schemes entered into on two separate and distinct occasions. The indictment is clearly duplicitous.

IV.

A. Petitioner was cross-examined at great length as to his interest in a gas contract that one Feazel had with the United Gas Company and the money received by him therefrom (R. 622, 625-631, 648-649, 652-656, 665-666, 669-670). During the cross-examination petitioner was asked the following question and made the following answer (R. 631):

> Q. "Isn't it a fact that Thomas J. Hill gave you a 1/3 interest in that Feazel contract?"
>
> A. "It is not, sir."

The Court had refused to permit the Government to go into this contract as part of its direct case, ruling that there was no similarity between the two transactions (R. 595-608). It is therefore clear that petitioner's cross-examination was as to a collateral matter, and that the Government was bound by his answer.

However, Hill was called by the Government in rebuttal and questioned as follows:

> Q. "Are you interested with Richard W. Leche in a gas contract?"

And over the objection of petitioner, was permitted to answer:

> "If your Honor please, I would like to reserve to myself the right to decline to answer questions which might incriminate me in any way."
>
> The Court: "Mr. Hill, unquestionably, you have the constitutional right to decline to answer questions that may accuse you of crime yourself."
>
> By Mr. Rogge:
>
> Q. "Do I understand, Mr. Hill, in answering as to this particular contract, you are insisting upon your privilege against self-incrimination?"
>
> A. "Yes, sir."
>
> Mr. Rogge: "That is all."

The calling of Hill to contradict the petitioner on a collateral matter was highly improper, but the calling of Hill when the prosecutor knew that Hill would assert his constitutional privilege and refuse to testify, cannot be condoned. No lawyer ever calls a witness to the stand without first questioning that witness. The following statement of Government counsel (R. 176) in this very case illustrates this fact: "Before questioning the witness, Your Honor, I am familiar with what he intends to testify about."

But that was not all. Counsel for the Government, in summation, repeatedly referred to the Hill incident (R.

716, 720-722, 725, 750). In attacking petitioner's credibility by naming the persons he contradicted, the prosecutor went so far as to state "and he even also contradicts Tom Hill" (R. 716), and later he tells them "what Tom Hill had to say when he was asked to tell what he knew about this transaction"; although Tom Hill had said nothing.

> "Now, gentlemen, coming back to this same man Tom Hill again, you will remember that I asked him when I put him on the witness stand about his transactions with Leche. You will remember that Leche in his cross examination said that each and every one of these transactions were perfectly legitimate, that there was absolutely nothing wrong with any of them, and yet when I asked Hill on the stand to tell me what he knew about this very business transaction that Leche said was perfectly legitimate and all right, Hill's reply or answer to me was 'I refuse to answer on the ground my answer would incriminate me.' That is what Tom Hill says. That is what Tom Hill had to say when he was asked to tell what he knew about this transaction from which Leche received the amount of money he admitted receiving, namely, over Two Hundred Thousand Dollars up to date, and which Leche swore on that stand was a perfectly legitimate transaction."

This was nothing more or less than a deliberate attempt to convict the petitioner by any and all means, fair or foul. While a prosecutor "may strike hard blows, he is not at liberty to strike foul blows." *Berger* v. *United States*, 295 U. S. 78, 88.

B. Petitioner was cross-examined as to his various tax returns. The procedure followed in such examination was for the prosecutor to refer to the number of the item, read to petitioner the printed matter of said item together with any insertion made by petitioner, and then ask petitioner to explain such item. This examination was thorough and showed that a close study of the returns had been made by

the prosecutor. Petitioner was questioned regarding a $14,030.90 item appearing in his 1939 tax return (R. 633-634). Petitioner did not recognize the item of income and so stated, replying that his accountant had made out the return. Great capital was made of this by the Government in summation (R. 728-729):

> "You have that man getting on the stand and denying that he got the Thirty-one Thousand Dollars from Thomas, and yet an item of Fourteen Thousand Dollars is there that he cannot tell you where it came from. It is the fourth line, or the fourth item in this tax return. Do you gentlemen suppose that if you had gotten Fourteen Thousand Dollars from a certain transaction last year that you wouldn't remember where it came from? Yet Leche gets on the stand and tells you that very story and then wants you to believe him when he says he didn't get the Thirty-one Thousand Dollars from Thomas. He has an amount twice his salary, something that happened last year, and he goes on the stand and tells you that he doesn't know where it came from. Then he wants you to believe him when he says he didn't get the Thirty-one Thousand Dollars from Thomas."

The gross unfairness of it all was that the said item of $14,030.90 was not an item of income at all, but a loss, which item showed in red on the original return in possession of Government counsel, but did not show in red on the photostatic copy handed petitioner on the witness stand. Moreover, the prosecutor in questioning petitioner as to the printed item on the return, omitted the words "or loss" from the fourth printed item on the return, "Income (or loss) from business or profession." The photostatic copy of the return handed petitioner on the witness stand showed no breakdown of this item, but Government counsel had in his possession and thereafter offered in evidence (R. 1042) a return showing the breakdown of this very item. Such a misleading of petitioner was a grave de-

parture from the accepted and usual course of judicial proceedings.

C. According to the indictment and the contention of the Government, four persons: petitioner, Abernathy, Younger and Thomas (who was not indicted), participated in the alleged scheme to defraud. Abernathy and Younger on the day of the trial pleaded guilty. Thomas and Abernathy were called by the Government as witnesses, Thomas on direct, Abernathy in rebuttal. Petitioner, who was not a member of the Highway Commission nor charged with any duties in relation to the purchase of the trucks, proceeded to trial alone, not only unfamiliar with the details of the truck transactions, but with the parties who actually handled the transactions and details testifying for the Government.

The position of petitioner, who was tried after "a tremendous political upheaval took place in the state" (R. 179), to say the least, parallels the position of the defendant in *Crawford* v. *United States*, 212 U. S. 189, which so impressed this Court that it stated: "The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him" (R. 203). "It is hardly possible to imagine a case where greater care was necessary in regard to the exclusion of proper and admissible evidence than in the one before us" (R. 205). And regarding the plea of guilty by a co-defendant under the same indictment, this Court said: "While this action of Matchem was not the slightest evidence of the guilt of defendant, * * * it left defendant without the aid of Matchem in the trial of the case" (R. 203).

Yet the "rule of care" laid down by this Court was not followed in the instant case. Thomas, the only witness to testify he gave any money to petitioner, and his testimony in this respect stands absolutely alone, being unconfirmed and uncorroborated by the testimony of any other witness,

by any document, any word, or any circumstance, and denied by petitioner (R. 613-614), on cross-examination was asked (R. 417):

> Q. "What was the occasion for making these payments to him?"

At this point Government counsel objected to "what defendant may have said as being self-serving." The court ruled that Thomas could answer the question. Thomas answered:

> "It was during the Sixth District Congressional Campaign. Governor Leche told me * * * ——"

At this point the Government again objected, this time on three grounds: that it made no difference what the defendant said, that his statement was "self-serving", and "hearsay"; and was sustained by the court because "it wouldn't make any difference if it was gotten from the state what he did with it."

Whether the money "was gotten from the state" and whether petitioner received any of it, were clearly facts to be determined by the jury, and the proper subject of cross-examination. The trial court not only found the fact itself, but actually used it as the basis of sustaining the objection, and thus prevented petitioner from challenging the uncorroborated statement of Thomas as to the alleged payments, a clear deprivation of petitioner's constitutional rights. This is one of the things which the appellate court "deemed to be not sufficiently meritorious to require special mention."

The indictment alleged that defendants entered into two agreements, one in August 1937 and one in July 1938. Thomas testified that in August 1937 and July or August 1938 petitioner, Abernathy and Thomas met on each occasion to discuss the purchase of trucks for the Highway Commission. Petitioner, called as a witness in his own

behalf, testified that neither of the two meetings testified to by Thomas ever took place, and further that he never discussed with Thomas the purchase of trucks at any time. Abernathy was called by the Government in rebuttal, and over the objection of petitioner was permitted to testify that in August 1937 there was a meeting in his office of the Highway Commission at which Leche, Abernathy and Thomas were present. The testimony of Abernathy was purely corroborative and in no way rebuttal, but part of the Government's main case, and its admission was an abuse of discretion which gravely prejudiced petitioner's rights. The fourth question asked of Abernathy by the prosecutor as he took the stand makes evident its purpose:

> Q. "And you pleaded guilty here on Monday?"
> A. "I did" (R. 672).

This error was accentuated by the quite incomprehensible refusal (R. 632-633) of the court to permit petitioner's counsel to examine Abernathy as to the second meeting in 1938, the court ruling that outside of questions affecting his credibility the cross-examination was limited to matters covered on direct examination (R. 682-683). Abernathy, having been allowed to testify in rebuttal, was subject to cross-examination on any issue in the case. The Government could not by the calling of an accomplice in rebuttal thus limit his cross-examination. A trial of a criminal case is not a game of thrust and parry. As said by this Court in *Berger* v. *United States*, 295 U. S. 78, 88: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Abernathy and Thomas were the only witnesses who gave testimony in reference to the petitioner. The Government, by continual objections mostly sustained by the court, prevented petitioner from challenging the statements of both. The curtailment of the cross-examination of the two alleged co-conspirators, Abernathy and Thomas, deprived the petitioner of his day in court.

D. Three prosecutors summed up for the Government. The misconduct of each was neither slight nor attributable to the heat and enthusiasm of advocacy, but so pronounced and persistent that it shows a studied effort to inject into the case irrelevant and prejudicial matters for the sole purpose of procuring a verdict of guilty at any and all costs. Continued appeals to prejudice and passion (R. 733, 735-736, 738-739), intemperate, abusive and over-zealous remarks, referring to the defendant as "the sort of animal that does not smell good, and some of you farmers know what I mean if you have been out in the field" (R. 740), "this 250 pounds of human flesh" (R. 738); appealing to individual jurors by calling them by name (R. 745); making the jurors both the victims of the scheme and the judges of petitioner (R. 745-746); characterizing the summation of counsel for petitioner as a plea of leniency (R. 748-749); calling attention to the fact that a counsel for the Government was executive head of the criminal division of the Department of Justice of the United States (R. 749-750); waving the American flag over the land of the free and the home of the brave (R. 748); and finally, placing duty above the pleasant relationship that existed between petitioner and the United States Attorney, and with sadness in heart asking in the name of justice for a verdict of guilty (R. 752); all of which is clearly repugnant to and violative of the sound principle laid down by Mr. Justice Roberts in his

dissenting opinion in the case of *United States v. Socony Vacuum Oil Company,* 310 U. S. 150, 264, as follows:

> "One of the most reprehensible things that a prosecutor can do is to attempt to put in evidence before the jury his own and his colleagues' opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the government. This fact lends its undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons."

E. Such erroneous statements of ABC facts of petitioner's case by the Circuit Court of Appeals in its abbreviated opinion, that petitioner was "a member of the Highway Commission" and the purchase of the trucks was a "purchase by the State", show such a fundamental misconception of the case as to have deprived petitioner of his right of appeal, although the district court saw fit to impose on petitioner an imprisonment of ten years, while of the other three participants in the alleged scheme, one was not even indicted and two were fined $1000 and $3000 respectively.

Conclusion.

WHEREFORE, for the foregoing reasons, petitioner Richard W. Leche respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

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